90-1863

No._____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

WALKER L. CHANDLER and
CAROLE ANN RAND,
Petitioners,

vs.

GEORGIA PUBLIC TELECOMMUNICATIONS
COMMISSION, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the court of appeals incorrect in reversing the district court's order granting injunctive relief, which order prohibited government officials from excluding Petitioners from a public forum for political speech in violation of their rights under the first and fourteenth amendments to the United States Constitution?
2. Is the first amendment guaranty of free speech violated by the actions of a state-owned television broadcaster, when that broadcaster excludes a candidate for elective office from a forum for political speech based upon the content of that candidate's speech?
3. Is the fourteenth amendment guaranty of equal protection violated by the actions of a state-owned television broadcaster, when that broadcaster excludes a ballot-qualified candidate from a forum for political speech while making that forum available to other ballot-qualified candidates who are similarly situated?

PARTIES TO THE PROCEEDING

Plaintiffs/Petitioners:

Walker L. Chandler
Carole Ann Rand

Defendants/Respondents:

Georgia Public Telecommunications Commission
Dr. Richard E. Ottinger
Frank Bugg
Bill Johnston
Frank Jones
Robert James
Dr. Werner Rogers
Dr. Dean Propst
Jackie Ward
Lovick Corn
Kenneth Breeden
William Allison

Intervenors/Respondents:

The Atlanta Journal
The Atlanta Constitution

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IN THE

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GEORGIA PUBLIC TELECOMMUNICATIONS
COMMISSION, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners Walker L. Chandler and Carole Ann Rand pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on October 31, 1990.

OPINIONS BELOW

The United States District Court for the Northern District of Georgia, Atlanta Division, entered an order and opinion on October 18, 1990, granting Petitioners' motion for a temporary restraining order.

The United States Court of Appeals for the Eleventh Circuit entered an order on October 31, 1990, vacating the district court's grant of the temporary restraining order, and on March 1, 1991, denied Petitioners' petition for rehearing and suggestion of rehearing *en banc*.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed is the order of the United States Court of Appeals for the Eleventh Circuit dated October 31, 1991.

A petition for rehearing and suggestion of rehearing *en banc* to the Eleventh Circuit Court of Appeals was denied on March 1, 1991.

This Court has jurisdiction to review the judgment of the Eleventh Circuit Court of Appeals by virtue of 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

U.S. Constitution, amend. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, amend. XIV, sec. 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On September 17, 1990, Walker L. Chandler ("Chandler"), the duly qualified candidate of the Libertarian Party of Georgia for the office of lieutenant governor of the State of Georgia, filed his Complaint and Motion for Temporary

Restraining Order in the United States District Court for the Northern District of Georgia, seeking injunctive and declaratory relief against the Georgia Public Telecommunications Commission ("GPTC"), an instrumentality of the State of Georgia. The district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331.

Political debates were scheduled to be televised on GPTC's member television stations between the Democratic and Republican candidates for the office of lieutenant governor (aired on Friday, November 2, 1990), and the office of governor (aired on Sunday, November 4, 1990). The Complaint alleged *inter alia* that GPTC's decision to exclude Chandler and Libertarian gubernatorial candidate Carole Ann Rand ("Rand") from the debates violated their first amendment right to free speech and fourteenth amendment right to equal protection.

On October 3, 1990, GPTC moved to dismiss the Complaint, asserting as grounds therefor that (1) the district court lacked subject matter jurisdiction over the claims; and (2) GPTC was immune from liability pursuant to the eleventh amendment to the United States Constitution. The district court heard oral argument on the pending motions on October 4, 1990. Subsequently, the district court allowed Chandler to add as defendants the members of GPTC in their individual capacities. The court also permitted Rand to intervene as a plaintiff.

On October 18, 1990, the court conducted an evidentiary hearing regarding the reasons for GPTC's decision to exclude Chandler and Rand from the proposed debates. On that same day, the court issued its Order, which is the subject of the instant case, enjoining Respondents from televising either proposed debate unless they included the Libertarian candidates.

On October 19, 1990, the district court granted the motion to intervene of the Atlanta Journal and the Atlanta

Constitution for purposes of the appeal and also certified its Order for immediate appeal pursuant to 28 U.S.C. § 1292(b).

Respondents timely filed notices of appeal and petitioned for permission to appeal pursuant to 28 U.S.C. § 1292(b). Respondents also moved to expedite the appeal and for a stay of the district court's order. The Eleventh Circuit Court of Appeals granted the motions for expedited appeal and for stay on October 26, 1990.

On October 30, 1990, the Eleventh Circuit heard oral argument and on the following day issued its opinion permanently vacating the district court's order and remanding the case to the district court with instructions to dismiss the Complaint. Chief Judge Clark filed a dissenting opinion. Petitioners timely filed a petition for rehearing and suggestion of rehearing *en banc* with the Eleventh Circuit, which were denied by that court on March 1, 1991.

ARGUMENT

I. THE EXCLUSION OF PETITIONERS FROM THE DEBATES WAS AN UNCONSTITUTIONAL RESTRICTION OF THEIR FIRST AMENDMENT RIGHT TO FREE SPEECH.

A. *Petitioners' Speech Is Protected "Core Political Speech" Within The Scope Of The First Amendment.*

Petitioners were candidates for political office, duly nominated by an established, recognized, ballot-qualified political body. GPTC excluded Petitioners from participating in debates between candidates for the offices they were seeking. These debates took place mere days before the citizens of Georgia went to the polls. Petitioners' speech clearly falls within that category of speech which receives the highest constitutional protection: core political speech.

The Court has defined "core political speech" as "interactive communication concerning political change." *Meyer v. Grant*, 486 U.S. 414, 422 (1988). Core political speech is entitled to "First Amendment protection. . . 'at its zenith.' " *Id.* at 425 (*quoting Grant v. Meyer*, 828 F.2d 1446, 1456-57 (10th Cir. 1987)). The Court has stated that the first amendment itself "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957).

Relatively broad discretion may be exercised in the regulation of lesser categories of speech, such as commercial speech and obscene material. *See, e.g., Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1975); *Valentine v. Chrestenson*, 316 U.S. 52 (1942). However, any exercise of government regulation over core political speech is "subject to exacting scrutiny." *Meyer*, 486 U.S. at 420.

With respect to this case, no more telling example of "interactive communication concerning political change" can be imagined than debates between candidates for political office held only a few days before the elections. Petitioners' speech is clearly core political speech, and any restrictions on that speech must be subjected to the strictest constitutional review.

B. *Respondents Excluded Petitioners From A Public Forum.*

1. The Debates, Not GPTC's Broadcast Facilities, Were The Forum.

The Eleventh Circuit construed the "forum" in this case to be GPTC's broadcast facilities, stating that GPTC does not function as a "marketplace of ideas," and that therefore the state is permitted to regulate the content of speech. Appendix at A-4. The court below, however, misapprehended the nature of the "forum" implicated here.

The district court, in granting the injunctive relief sought by Petitioners, relied on *Kelley v. WMUL-TV,* 7 Med.L.Rptr. 1094 (S.D.W.Va. 1980). Appendix at A-29. *Kelley* involved a factual setting indistinguishable from the facts in this case. In *Kelley,* a Libertarian gubernatorial candidate was denied participation in debates which were broadcast on public television, held between the Republican and Democratic candidates for governor of West Virginia. The court granted a temporary restraining order, finding that the government had engaged in unconstitutional content-based discrimination against the Libertarian candidate's speech. The *Kelley* court determined that it was the live political debate itself which is the forum, not the broadcast facilities. *Id.* at 1097. In the case at bar, GPTC's broadcast facilities were simply the medium through which the public forum of the political debates was transmitted to the public.

The Court utilized a similar forum analysis in *Cornelius v. NAACP Legal Defense and Education Fund,* 473 U.S. 788 (1984). In *Cornelius,* a legal defense and political advocacy organization sought to participate in the Combined Federal Campaign ("CFC"), a charity drive conducted in the federal workplace. The petitioner argued that a first amendment forum required tangible government property, while the respondents contended that the forum should be defined in terms of the access sought by the speaker. *Id.* at 801. The Court agreed with the respondents, stating that:

> [w]e agree with respondents that the relevant forum for our purposes is the CFC. Although petitioner is correct that as an initial matter a speaker must seek access to public property or to private property dedicated to public use to evoke First Amendment concerns, forum analysis is not completed merely by identifying the government property at issue. Rather, in defining the forum we have focused on the access sought by the speaker.

Id. See also Perry Education Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37 (1982) (forum defined as school's internal mail system and teachers' mailboxes, notwithstanding that an "internal mail system" lacks a physical situs); *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974) (forum defined as advertising spaces on city-owned buses).

In the case *sub judice,* the district court did not find, nor did Petitioners assert, any general right of access to the media. Rather, Petitioners sought access to the debates. Just as in Cornelius, the right of access was sought not to the physical facility, but to the communicative activity being held at the facility.

2. The Debates Were A Public Forum.

In reviewing a government decision to exclude a speaker from a forum, the Court must determine the nature of the forum involved. The debates in this case were a public forum. In *Perry,* 460 U.S. at 45, the Court defined as "quintessential public forums" those places "which by long tradition or government fiat have been devoted to assembly and debate" and which "have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." From the famous orations of Clay and Webster through the Lincoln-Douglas debates, there is a long tradition in this country of discussion and debate upon public issues, especially between candidates for elective office. Live debates between political contenders must certainly be considered part of such "quintessential public forums."

When a public forum is involved, the state's ability to limit freedom of expression is sharply circumscribed. *Perry,* 460 U.S. at 45. "Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius,*

473 U.S. at 800. Respondents' justification for the exclusion of Petitioners does not satisfy this constitutional standard.

C. *Respondents' Justification For The Exclusion Of Petitioners From The Debates Does Not Satisfy The Requisite Constitutional Standard.*

The exclusion of Petitioners from the debates was content-based discrimination by Respondents. It was neither based on a compelling state interest, nor narrowly drawn to achieve such an interest. The district court found after hearing evidence submitted by Respondents at the October 18th hearing that "[t]he basis articulated by [Respondents] is not even an attempt to mask their content-based motivations." Appendix at A-49. Respondents stated the following as reasons for the exclusion of Petitioners from the debates:

> Were its air waves [sic] open for unrestricted access to all citizens, the GPTC would be unable to operate within the guidelines set by Congress through enactment of the Federal Communications Act. . . . GPTC clearly has as its legitimate purpose the dissemination of newsworthy information in a format it judges to be responsive to the demands of the public. The citizens of Georgia will, in large measure, vote for either the Democratic or Republican candidates in the upcoming elections.

Appendix at A-48. Furthermore, Dr. Richard Ottinger, Executive Director of GPTC, stated that the two "front runner" candidates were included in the debates because it was believed that the information presented by them was of greater interest to the public and, therefore, more newsworthy. Appendix at A-49.

The district court made a factual finding that Respondents' reason for excluding Petitioners from the debates was that Respondents believed the Libertarian platform to be less popular than those of the Republican and Democratic candidates. The court found that a decision to exclude a candidate based on the popularity of his or her platform or because the

candidate purportedly is less newsworthy necessarily involves a decision concerning the content of the excluded candidate's speech. Appendix at A-50. Such a decision constitutes content-based discrimination by Respondents in violation of the first amendment.

The Eleventh Circuit majority acknowledged that GPTC made its decision to exclude Petitioner based on "content," but wrongly concluded that such a decision was not improper. The court stated that "[i]t is clear that GPTC 'regulated content' by making a decision to air debates between candidates of the major parties. Contrary to the district court's order, however, *this content-based decision is not viewpoint restrictive* and does not violate the First Amendment." Appendix at A-5,6 (emphasis added).

The Eleventh Circuit determined that Respondents' decision to exclude Petitioners was "reasonable." (Appendix at A-6). However, considerations of the "reasonableness" of the government's actions are completely irrelevant here. In order to pass constitutional muster, the government's justification for the exclusion must satisfy both the strict constitutional standard of the existence of a compelling state interest, and the requirement of a showing that the restriction was narrowly drawn to achieve that interest. *Cornelius*, 473 U.S. at 800. The government's justification in this case satisfies neither. Therefore, the Eleventh circuit has decided a federal question in a way that conflicts with applicable decisions of this Court.

II. THE EXCLUSION OF PETITIONERS FROM THE DEBATES WAS A VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The class of persons involved in the debates was determined by GPTC itself when it decided to hold debates between political contenders for the offices of governor and

lieutenant governor. GPTC subsequently decided to limit participation in the debates to the candidates of the Democratic and Republican parties, thereby excluding Petitioners. GPTC's exclusion of Petitioners was a violation of Petitioners' right to equal protection under the fourteenth amendment.

The district court properly found that Petitioners were members of the same class as the Democratic and Republican candidates, in that "[a]ll are 'ballot-qualified,' meaning, theirs are the only names that will appear on the ballots for [the offices of governor and lieutenant governor]." Appendix at A-54,55. Under Georgia law, Petitioners were qualified to appear on the ballot because they were nominated by a political body which garnered votes equal to at least one percent of the registered voters in the state during the last statewide election. O.C.G.A. § 21-2-180.

Respondents were required to articulate a rational basis for excluding Petitioners from the class of persons allowed to participate in the debates. *See Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966). However, Respondents failed to offer any rational or legitimate reason whatsoever for the exclusion. As the district court stated: "the fact that the Libertarian candidates are less popular than the majority parties' candidates is not a rational basis for [their] exclusion." Appendix at A-55.

CONCLUSION

In its most basic essence, this case involves the issue of defining the limits of the state government's power to restrict free speech based on the content of that speech. Clearly, the vital constitutional issues of the first and fourteenth amendment guarantees to free speech and equal protection under the United States Constitution involved in this case are of extreme importance. Because the Eleventh Circuit decision misapplied existing Supreme Court precedent, and creates

dangerous precedent-setting error by vastly expanding the state government's power to restrict free speech based upon its content, this case merits a grant of certiorari by this Court.

The constitutional issues involved would be of extreme importance in any context. However, in the context of government restriction of the speech of a candidate for political office during a political campaign, these issues are of compelling urgency and importance. As Judge Clark stated in his dissenting opinion below: "[p]olitical debate should have the highest rank on the First Amendment's scale of liberties." Appendix at A-12.

The ruling of the court below raises the specter of government control of political ideas during a campaign for political office. If the Eleventh Circuit ruling is not reversed, the government-owned media will be permitted to select which ideas the citizenry will hear, thereby placing its stamp of approval on certain ideas and discounting or ignoring others. The possibility of government influence on the outcome of an election is a very real one. A more serious threat to the basic guarantees of democratic, representative government as guaranteed by the United States Constitution can scarcely be imagined.

For the foregoing reasons, Petitioners respectfully request that the Court grant certiorari to consider the compelling questions of constitutional import presented by this case.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE
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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8968

D.C. Docket No. 1:90-cv-2040-MHS

WALKER CHANDLER,
Plaintiff-Appellee,
CAROLE ANN RAND,
Intervenor-Plaintiff,
Appellee,

versus

GEORGIA PUBLIC TELECOMMUNICATIONS COMMISSION, et al.,
Defendants-Appellants,
ATLANTA JOURNAL AND ATLANTA CONSTITUTION,
Intervenors-Defendants,
Appellants.

Appeal from the United States District Court for the Northern District of Georgia

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(October 31, 1990)

Before CLARK, Circuit Judge, HILL* and COFFIN**, Senior Circuit Judges.

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*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable Frank M. Coffin, Senior U.S. Court of Appeals for the First Circuit, sitting by designation.

PER CURIAM:

On September 17, 1990, appellee Walker Chandler ("Chandler") filed suit in federal district court against the Georgia Public Telecommunications Commission ("GPTC"), an instrumentality of the State of Georgia. Chandler, theLibertarian candidate for lieutenant governor of Georgia, sought to enjoin GPTC from broadcasting a political debate on November 2, 1990, between the Democratic and Republican candidates for lieutenant governor unless he were included as a debating participant. Carole Ann Rand ("Rand"), the Libertarian candidate for governor, intervened as plaintiff and sought a similar injunction against the broadcast of a similar debate on November 4, 1990, between the Democratic and Republican

candidates for governor.1 After the plaintiffs had amended their complaint to add the members of GPTC in their individual and official capacities, the district court on October 18, 1990, issued a temporary restraining order. Basing its decision on First Amendment and Equal Protection grounds, the district court enjoined the defendants from televising either debate unless they included the Libertarian candidates. This expedited appeal followed.2 Briefs were filed on a time-shortened schedule, and we heard oral argument in Atlanta on October 30. We VACATE the district court's order permanently and REMAND with instructions to dismiss the complaint.

In view of the fact that the parties are in need of a prompt resolution of the issues, we delay the

issuance of our judgment only long enough for the following succinct opinion.

I. FIRST AMENDMENT

This court has held that the degree of control that a public broadcast licensee can exercise over its broadcast programming consistent with the First Amendment depends on the mission of the communicative activity being controlled. Schneider v. Indian River Community College Fund, Inc., 875 F.2d 1537, 1541 (11th Cir. 1989). Where the activity does not function as a pure marketplace of ideas, the state is permitted to regulate content in order to prevent hampering the primary function of the activity. Id. (citing Muir, 688 F.2d at 1050). Were GPTC a medium open to all who have a message, whatever its nature, GPTC would function as a marketplace of

ideas. See Muir, 688 F.2d at 1052 (Rubin, J. concurring). GPTC, however, is not such a medium. GPTC is "created, designed, and intended for the purpose of providing educational, instructional, and public broadcasting services to the citizens of the State of Georgia." O.C.G.A. section 20-13-5(a) (Supp. 1990). Further, as a public television station, GPTC is under an obligation to serve the public interest. Schneider, 875 F.2d at 1541. As testimony indicated, GPTC's employees make editorial decisions on a daily basis determining which programs to air in order to meet the needs and interest of Georgia's citizens. obviously a decision to broadcast on e program excludes, for that time, all other programs.4 Members of the public are not provided free access to GPTC air time.

It is clear that GPTC "regulated content" by making a decision to air

debates between candidates of the major parties. Contrary to the district judge's order, however, this content-based decision is not viewpoint restrictive and does not violate the First Amendment. As noted above, GPTC makes content-based decisions on a regular basis in order to serve Georgians. A decision to air any show is necessarily content-based. GPTC chose to air a debate between only the Democratic and Republican candidates because it believed such a debate would be of the most interest and benefit to the citizens of Georgia. Such a decision promoted GPTC's function, was "reasonable" and was "not an effort to suppress expression merely because public officials oppose the speaker's views." Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985).

Finding no policy or practice of GPTC that "pervasively 'curtail[s] access to ideas,' lending a constitutionally impermissible, discriminatory bias to the station's mission," Schneider, 875 F.2d at 1541, we conclude that the district court erred in basing its order on First Amendment grounds.5

II. EQUAL PROTECTION

The district court concluded that, for many of the same reasons that appellants' actions violated the First Amendment, a violation of the Equal Protection Clause of the Fourteenth Amendment also existed. Appellees are not members of a protected class, and thus appellants need only exhibit a rational basis for their decisions. See Eide v. Sarasota County, 908 F.2d 716, 722 (11th Cir. 1990). As we determined above, appellants' decisions

were rational, and we thus find no Equal Protection violation.6

III. CONCLUSION

Our view does not mandate, authorize or predict Orwellian state thought control through selective airing of viewpoints on public television stations. Without deciding, we can safely predict that the use of state instrumentalities to suppress unwanted expressions in the marketplace of ideas would authorize judicial intervention to vindicate the First Amendment. Short of that, public television stations must, no matter what may be the wishes of state government personalities, abide by the dictates of 47 U.S.C. section 315 regarding fairness and balance or lose their licenses.

The dissent is facially appealing insofar as it deplores the failure of the appellants to invite just one more

participant to each program. Whether that is good policy is, we believe, for the program decisions of the station. Were we to hold that such an invitation is required by the Constitution, we could see no principled basis upon which that rule could be limited to the candidate who has obtained a ballot position and not extended to all other serious candidates. A decision to air the debate between the two front runners, or the three who will appear on the ballot, or others, is appropriately made by the programmers undertaking to provide an educational program of sufficient interest to attract viewers. The mixture of ideas, protected by the First Amendment, is just as protected when offered by a write-in candidate as by one on the ballot by petition, by primary election, or by party convention. We are not

willing to establish a precedent that would require public television stations to forego the broadcast of controversial views touching upon important public issues -- environment, ecology, animal rights, ozone depletion -- lest the airing of such programs require the inclusion of a cacophony of differing views on each subject. The values sought to be fostered by the First Amendment would be frustrated, not furthered, by the fitting of such harnesses on public television.

We review the district court's grant of preliminary injunctive relief for abuse of discretion. United States v. Jefferson County, 720 F.2d 1511, 1519 (11th Cir. 1983). For the foregoing reasons, we conclude that the district judge did abuse his discretion in finding a substantial likelihood of success on the merits. Because appellees

do not meet the first part of the test for a preliminary injunction, we need not address the other elements of the test. Id.

We thus VACATE the district court's order permanently and REMAND with instructions to dismiss the complaint.

CLARK, Circuit Judge, dissenting:

This First Amendment case concerns the use of Georgia's publicly-owned television network to broadcast a public debate between two of the three candidates for the position of governor, and between two of the the three candidates for the position of lieutenant-governor. I applaud the decision to use the network for the debates; I deplore the state's exclusion of the duly qualified candidates of the Libertarian Party. Under the facts of this case, the First Amendment forbids the state from selectively choosing

which qualified candidates can and cannot debate and further forbids the state from denying its citizens the opportunity of simultaneously viewing the candidates whose names will face them on the ballot. The uncensored right to speak and to hear go to the heart of governance in this democracy. Political debate should have the highest rank on the First Amendment's scale of liberties. Thus, I respectfully dissent.

I. BACKGROUND

As noted by the majority, the Georgia Public Telecommunications Commission (GPTC)1 is an agency of the state of Georgia established by statute. GPTC is composed of nine members, six of whom are members of the general public appointed by the governor. GPTC also includes one elected official, the state school superintendent, as well as the

chancellor of the university system and the commissioner of technical and adult education. O.C.G.A. section 20-13-2 (Supp. 1990).

Besides the Republican and Democratic candidates, appellees are the only other ballot-qualified candidates in the races for governor and lieutenant-governor. They have qualified to appear on the general election ballot under O.C.G.A. section 21-2-180 by being nominated by a party that in the last statewide election received votes equal to at least on percent of the number of registered voters in the state of Georgia.2

Appellees asked to be included in the two debates. GPTC refused to include them and offered the Libertarians one-half hour of television time each to state their views. Appellees then filed suit seeking an

injunction against the sponsors of the debates from excluding them. The district court concluded that a temporary restraining order should issue to prevent the broadcast of the debates from taking place without the participation of the Libertarian candidates. The district court held that "defendants have filed to even articulate a reasonable basis for excluding ballot-qualified Libertarian candidates from a nonpublic forum." Order of Oct. 18, 1990, at 8. The court rejected appellants' argument that the Libertarians could be excluded on the basis that their views were less newsworthy than that of the major party candidates, holding that his was impermissible viewpoint-based discrimination. Id. at 10-11. The district court also found that appellees' Fourteenth Amendment equal

protection rights had been violated. Id. at 13-14.

II. DISCUSSION

The question involved here is essentially whether an arm of the state can organize and broadcast a debate between candidates for office, including some and excluding others. To my mind, the jurisprudence of the First Amendment surrounding the exclusion of speakers from government-created but nonpublic forums provides the answer.

The Supreme Court has established a typology of forums -- state-created places of information-exchange -- for purposes of First Amendment analysis. If a traditional forum (the public green, for example) is involved, the government must have a compelling state interest to justify any restrictions, which must be narrowly tailored. This rationale also applies to created

forums, that is, government-designated places of communication "for use by the public at large for assemble and speech, for use by certain speakers, or for the discussion of certain subjects." Cornelius v. NAACP Legal Defense & Education Fund, 105 S.Ct. 3439, 3449 (1985). By contrast, where a nonpublic forum has been created -- as in the case of teachers' school mailboxes, Perry Education Ass'n v. Perry Local Education Ass'n, 103 S.Ct. 948, 955 (1983) -- the government may impose content-based restrictions that are both "reasonable" and "not an effort to suppress expression merely because public officials oppose the speaker's view." Cornelius, 105 S.Ct. at 3448.

In this case, candidates' ideas will be exchanged on the issue of state governance and will then be telecast to voters throughout Georgia. There is,

however, no evidence here of governmental intent to "designate a place not traditionally open assemble and debate as a public forum," Cornelius, 105 S.Ct. at 3449, as in no sense has the general public has been invited to appear to GPTC's network and express its opinions on the election. It seems that, at a minimum, the government of Georgia has created a nonpublic forum.

However, by discriminating against the viewpoints expressed by the Libertarians, GPTC has violated even the minimal First Amendment standards applicable to nonpublic forums. Cornelius holds:

> Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions are reasonable in light of the purpose served by the forum and areviewpoint neutral. Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed

> within the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject.

105 S.Ct. at 3451 (citations omitted).

The district court was correct to find that the exclusion of the Libertarians was not "reasonable in light of the purpose served by the forum." Id. The purpose of the debates is presumably to expose the voters of Georgia to the opinions and policies of the candidates for public office. Such a goal would be consistent with the educational goals of Georgia's public broadcasting network. Excluding certain qualified candidates is not a reasonable method of achieving the debates' informational goals. Moreover, the district court's finding that GPTC's decision to exclude the Libertarians was

not "viewpoint neutral," id., is amply supported by the record. The transcript of the evidentiary hearing held by the district court is replete with statements by Dr. Ottinger, the director of GPTC, that GPTC decided that the viewpoint of the Libertarians was less valuable than those of the Democrats and Republicans: "The premise for the program that we designed was that the majority of the people would be most interested in the viewpoints of these two candidates, and that's why we want to put them head to head." Transcript, Oct. 18, 1990, at 20. "The point of views on the positions taken by the Democratic or Republican candidates would be of greater interest to the public than would by the Libertarian candidate in terms of the public making decisions who they would vote for." Id. at 22-23. "I think ... that the value

of the program was that only these two sets of views would be expressed, one contrasted with the other, because, again, they are the frontrunners for which the majority of the people, in all likelihood, will vote." Question by the court: "You think the viewpoint expressed by the Libertarian candidates would somewhat detract from that?" A: "Yes, Sir." Id. at 33.

Although it may be justifiable for private broadcasting networks to broadcast debates that exclude qualified candidates, see, e.g., Johnson v. FCC, 829 F.2d 157 (D.C. Cir. 1987)(commercial networks may broadcast a debate between major party presidential candidates and exclude third parties' candidates, even those on the ballot in a number of states),4 the purposes behind public broadcasting are significantly different from those behind commercial,

competitive television. Public broadcasting is premised on the belief that the free market will not provide all of the programming and information necessary for an educated public. Thus, many programs that would fail miserably to pay their own way on the private networks appear on public television. The political debates at issue appear to be a case in point. In the context of noncompetitive programming, the government's stated rationale for excluding the Libertarians -- that their views are less newsworthy than those of other candidates -- seems especially weak and not a little ironic.

This case is akin to situations where the government has acted to prevent expression simply because officials do not agree with the message conveyed. For example, in Brooks v. Auburn Univ., 412 F.2d 1171 (5th Cir.

1969), this court held that the First Amendment was violated when the president of Auburn University rescinded an invitation to the Reverend William Sloane Coffin to speak on campus. The opinion stated that "the right of the faculty and students to hear a speaker ... cannot be left to the discretion of the university president on a pick and choose basis." Id. at 1172; see also Board of Education v. Pico, 102 S.Ct. 2899, 2814 (1982)(Blackmun, J., concurring)("[O]ur precedents command the conclusion that the State may not act to deny access to an idea simply because state officials disapprove of the idea for partisan or political reasons." (footnote omitted)). There is little as important as an informed electorate. The electorate is the ultimate check on governmental abuse of power. To allow political appointees

such as those that comprise the GPTC boards to "pick and choose" the information the public receives from the interplay of candidates speaking unrehearsed short-circuits the controls built into our government system.

GPTC cannot persuasively maintain that, merely because candidates do not belong to one of the two major national parties, their electoral bids are never successful with the Georgia electorate. As recently as 1968, George C. Wallace carried Georgia in the presidential election, garnering 42.9% of the vote. Statistical Abstract of the United States, 1976, Table 729, at 455 n.5 (Bureau of the Census, 1976). Would GPTC have excluded George Wallace from debates it had organized between Richard Nixon and Hubert Humphrey because it perceived that Wallace was unlikely to win the presidency, having a largely

regional appeal? Unquestionably, nomination by a major party bestows a greater likelihood of election than nomination by a less well-known party. and the Libertarian candidates may very well be quite far behind in the polls.5 But a judgment that their views are not newsworthy, especially given the station's willingness to provide one-half hour each to the Libertarian candidates apart from the debates, indicates that GPTC's decision to exclude them "is in reality a facade for viewpoint-based discrimination." Cornelius, 105 S.Ct. at 3454; see also Searcey v. Harris, 888 F.2d 1314, 1324-25 (11th Cir. 1989)(exclusion of anti-military activists from school career days constituted viewpoint-based discrimination).

The majority finds that a line of cases following Judge Rubin's

concurrence in the former fifth circuit case Muir v. Alabama Educational Television Comm'n, 688 F.2d 1033 (5th Cir. 1982) (en banc), is controlling and requires that courts give maximum leeway to programming decisions of public broadcasters. Judge Rubin "held that the degree of control which can be exercised consistently with the First Amendment depends on the mission of the communicative activity being controlled. Where ... the activity is not designed to function as a pure marketplace of ideas, 'the state may regulate content in order to prevent hampering the primary function of the activity.'" Schneider v. Indian River Comm' College Found., 875 F.2d 1537, 1541 (11th Cir. 1989) (quoting Muir, 688 F.2d at 1050 (Rubin, J., concurring). Muir thus stands for the proposition that public TV may decide not to broadcast a program

based on its content.

In contrast to the situation in Muir, this case concerns the First Amendment rights of the Libertarians to express their viewpoints, not the prerogative of the Georgia Public Television Network to maintain control over programming content. GPTC has already determined, to the extent it can, the content of its broadcasts of the two debates. That is to say, GPTC has already decided to give over its airwaves to political contenders for the offices of governor and lieutenant-governor of Georgia. GPTC had not and could not dictate the actual messages those contenders will convey. Appellees do not challenge GPTC's content-based decision to air debates between political candidates. Instead, they challenge GPTC's decision to exclude their particular viewpoints from the

electoral conversation.

The majority quotes Schneider, 875 F.2d at 1541, for the proposition that the Libertarians must show that GPTC has followed a policy or practice of "pervasively 'curtailing access to ideas.'" Id. (quoting Muir, 688 F.2d at 1053). However, Dr. Ottinger admitted that the audience for the Libertarians' separate half-hour would be significantly diminished from the audience for the debate. Transcript, Oct. 18, 1990, at 20. By not allowing either of the Libertarians to present their opinions with the other ballot-qualified candidates, the state of Georgia is clearly limiting the number of people who will be exposed to the Libertarians' views. Perhaps more importantly, the decision to show or not to show a particular program or documentary and the ideas contained

therein is very unlike the decision to exclude political parties from a debate. The positions put forward in a particular television program may find equally effective expression through a wide variety of media. I would not contend, therefore, that when the state shows a documentary it must include all viewpoints in that documentary. But an idea is not a candidate, and freedom of speech has a greater meaning in the election arena. There is only one way for candidates themselves to argue their positions with each other: through the medium of a debate. A debate serves to inform the public far more effectively than any candidate's lone appearance could by creating a synergism between the candidates' immediately conflicting positions. For the state to set up such a debate and exclude certain candidates not only puts its stamp of approval on

the favored candidates, it also "curtail[s] access to ideas" by preventing the ideas and information that would be produced through the debating candidates' interaction from coming to light.

The district court's decision to draw a distinction between ballot-qualified and write-in candidates for purpose of access to the debate was justified. The state of Georgia has established an objectively neutral method of qualifying for the ballot -- in this case, the Libertarians won at least 29,000 votes in the last statewide election. Write-in candidates do not have to meet the same test of public support. Given a limited amount of broadcasting time, it would seem reasonable to distinguish between these two groups of candidates. GPTC could have thereby avoided any inquiry into

the viewpoints or newsworthiness of the candidates involved; it could have thereby avoided having an agency of the state effectively endorse the major party candidates. The majority argues that the First Amendment makes no distinction between the ideas of candidates, whether write-in or major party. I agree and would add that neither should the officers of GPTC. But where lines must be drawn, the opinion of at least 29,000 voting Georgians seems a perfectly valid distinction to make. I cannot say the same for the unbridled discretion of GPTC.

This court should, in this case and all others, decide the question before it. We are not faced with a situation where there are forty-four ballot-qualified candidates running for the governor of Georgia, or even four. It

is clear that, were it difficult or impossible to conduct a debate with the number of candidates qualified for the ballot, GPTC would have a neutral and not viewpoint-based rationale for not having all of the candidates on the same debate panel at the same time. But there has been no showing that this is the case here, and there is time enough to decide questions that have not presented themselves.

The restraining order entered as to both debates, including the debate sponsored by the AJC, should be upheld because the state of Georgia is effectively endorsing the major party candidates by broadcasting a debate that excludes other candidates. The state must actively avoid even the appearance of favoritism between candidates. If nonbroadcast entities such as the AJC know that the only broadcast outlets

typically available for political debates (i.e., public television) are prohibited from televising debates that do not include all qualified candidates willing and able to appear, they will factor this knowledge into their estimates of the planning and lead time necessary to organize debates.

III. CONCLUSION

The Libertarian candidates wish to address topics that are within the parameters of the debates. They are members of the class of speakers for whom the debates were created, having qualified to appear on the general election ballot. And a decision that debates including the Libertarians based on the fact that their views are less newsworthy than those of the major party candidates is necessarily based on an estimation of the value and substance of their views. Because viewpoint

discrimination is unconstitutional in any forum, public or otherwise, the district court should have been affirmed.

1 Chandler and Rand were offered thirty minutes of air time on the GPTC stations to present their views.

2 Subsequent to the district court's order, The Atlanta Journal and The Atlanta Constitution, the party responsible for paying the cost of the stage set-up for the gubernatorial debate (GPTC is responsible for broadcast and other costs), intervened to pursue an appeal. The newspaper has no active role in the lieutenant gubernatorial debate; GPTC itself decided to initiate and broadcast that debate.

3 In Schneider, we cited Judge Rubin's concurring opinion in Muir v. Alabama Educ. Television Comm'n, 688 F.2d 1033 (5th Cir. 1982)(en banc), cert. denied, 460 U.S. 1023 (1983), a former Fifth Circuit case that is binding precedent under Stein v. Reynolds Sec., Inc., 667 F.2d 33,34 (11th Cir. 1982). Judge Rubin's concurrence is the holding of Muir because, absent a majority opinion, the narrowest concurrence is the holding of the case. Schneider, 875 F.2d at 1541.

We note that appellees contend that Schneider and Muir should not control this case. We disagree. While the facts of those case are not identical to the instant case, those cases addressed a very similar issue to the one before us: the extent of discretion a public broadcast licensee can exercise consistent with the First Amendment.

4 In a similar vein, it might be said that plaintiffs were excluded from the program. The decision to air a debate between the Democrat and Republican candidates may be said to exclude, by not including, all others, Libertarian, write-in or potentials.

5 We note that we are not alone in finding that the First Amendment does not necessarily grant political candidates the right to be included in candidate debates. See, e.g., Deyoung v. Patten, 898 F.2d 628, 632-33 (8th Cir. 1990) (finding, among other things, that minor party candidate who had not been included in a debate conducted and televised by Iowa Public Television had "no First Amendment right to appear on television, at least to any extent greater than the limited right of access granted by the equal time provision of the Federal Communications Act"), and the cases cited therein.

6 We thus need not address the debate among the parties over Equal Protection cases from other circuits.

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1 Appellees' amended complaint names the directors and officers of GPTC as defendants in their individual capacities. These defendants are: Frank Bugg, deputy director; Dr. Richard Ottinger, executive director; Bill Johnston, director of production; Frank Jones, chairman, board of directors; and boardmembers William Allison, Dr. Kenneth Breeden, Nancy Connolly, Lovick Corn, Robert James, Dr. Dean Probst, Dr. Werner Rogers, and Jackie Ward. See

Plaintiffs' First Amendment of Complaint, Oct. 18, 1990, at 1.

2 In 1988, there were 2,941,339 registered voters in Georgia. Thus, a Libertarian candidate must have received at least 29,413 votes in a statewide election held that year.

3 Ottinger further testified that it would not be difficult to expand the format one-half hour to include the Libertarians. Transcript, Oct. 18, 1990, at 24.

4 I note that the FCC has refused to prohibit non-inclusive debates broadcast over the public airwaves, regardless of the sponsor. See In re Cyril E. Sagan, 1 FCC Rcd. 10 (1986). Although I believe much deference to agency decision-making is due, the courts are the ultimate guardians of the Constitution.

5 However, Dr. Ottinger admitted that the decision to exclude the Libertarians was not based on an examination of opinion polls. Transcript, Oct. 18, 1990, at 30.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WALKER CHANDLER, :

Plaintiff, :

v. : CIVIL ACTION

GEORGIA PUBLIC TELECOMMUNICATIONS COMMISSION, et al., : 1:90-cv-2040-MHS

Defendants. :

ORDER

Presently before the Court is plaintiff's motion for a temporary restraining order. For the reasons set forth below, the Court will grant plaintiff's motion.

I. Background

Plaintiff Walker Chandler ("Chandler"), Libertarian candidate for lieutenant governor of Georgia, and intervenor Carol Ann Rand ("Rand"), Libertarian gubernatorial candidate, seek to enjoin Georgia Public Telecommunications Commission ("GPTC")

from hosting political debates which exclude them from participation. GPTC plans to hold a pre-election political debate featuring the Democratic and Republican candidates for lieutenant governor on November 2, 1990. A similar debate featuring the gubernatorial candidates for the two parties will be sponsored by the Atlanta Journal & Constitution ("AJ&C"). Both debates will be televised on Georgia Public Television ("GPTV"), GPTC's broadcasting facility, on November 4, 1990. The Libertarian candidates' previous request for inclusion in these debates was denied by GPTC; Chandler and Rand, however, were offered air-time of their own, separate from the debate. See Transcript of October 4, 1990, hearing at 5.

The Court held a hearing on plaintiff's motion on October 4, 1990.

Plaintiff appeared on his own behalf and on behalf of intervenor Rand; GPTC was represented by the State Attorney General. At the hearing, the Court granted Rand's motion to intervene, denied a motion to intervene filed by proposed Republican writ-in candidate, Mitchell Williams,1 and denied defendant's motion to dismiss for improper service. on October 17, 1990, at the direction of the Court, plaintiff filed an amended complaint which included as defendants the officers and directors of GPTC. At a final hearing on October 18, 1990, defendants presented testimony concerning GPTC's decision to exclude the Libertarian candidates from the debates.

II. Discussion

Plaintiff challenges the exclusion of Libertarian candidates as a violation of the First Amendment and the Equal

Protection Clause of the Fourteenth Amendment. Plaintiff also alleges that the exclusion of Rand from the gubernatorial debate constitutes an act of sex discrimination on the part of GPTC. Finally, plaintiff contends that GPTC's "free gift" of television time is a special favor in violation of Georgia' Code of Ethics for Members of Commissions, and amounts to commercial programming in violation of GPTC's statutory purpose. See O.C.G.A. sections 45-10-3, 20-13-1(a)(1990 and Supp. 1990). Defendant moves to dismiss the action for lack of personal and subject matter jurisdiction and failure to state a claim.

A. Eleventh Amendment Immunity

Defendant argues that the Court lacks personal jurisdiction because GPTC is protected from suit by Eleventh Amendment immunity. There is no dispute

that GPTC is an instrumentality of the state, created by statute and funded, in part, by the Georgia legislature. See O.C.G.A. section 20-13-1 to -12 (Supp. 1990). Defendant argues that it is protected from monetary and injunctive relief by Eleventh Amendment immunity which has not been waived. See Fouch v. Jekyll Island-State Park Authority, 713 F.2d 1518 (11th Cir. 1983). While a state agency is protected from suit by Eleventh Amendment immunity, a plaintiff may seek to enjoin unconstitutional state action by naming the responsible state officer is his complaint. See Ex parte Young, 209 U.S. 123 (1908), Gamble v. Florida Department of Health and Rehabilitative Services, 779 F.2d 1509, 1511 (11th Cir. 1986).

Plaintiff filed an amended complaint with the court on October 17, 1990. Plaintiff's amended complaint now

properly includes as defendants the officers and directors of GPTC.2 Accordingly, the Court will dismiss the action against GPTC on Eleventh Amendment grounds.

B. FCC's Primary Jurisdiction

Defendants insist that the Court lacks subject matter jurisdiction over this action because plaintiff's exclusive remedy is to proceed before the Federal communications Commission ("FCC"). Because the FCC typically handles claims against broadcasters, defendants argue that plaintiff should proceed against GPTC before the FCC to enforce the equal time provision of the Federal Communications Act. See 47 U.S.C. section 315.3

Plaintiff is not attacking GPTC as a broadcaster, however, nor is he seeking equal time pursuant to Section 315.4 Rather, plaintiff challenges

defendants in their capacities as state officials for alleged constitutional violations. It would be unreasonable to require plaintiff to seek redress for constitutional violations with the FCC simply because GPTC is a broadcaster and the FCC regulates some aspects of GPTC's operation. The FCC has no special expertise in handling constitutional claims of this kind, nor is there a suitable administrative remedy available. In addition, there is no question that plaintiff has not attempted to bring a private right of action under Section 315. Cf. Belluso v. Turner Communications Corp., 633 F.2d 393 (5th Cir. 1980). Therefore, the Court finds the action is properly before the Court and will deny defendant's motion to dismiss for lack of subject matter jurisdiction.

C. Special Favors, Commercial Programming, Sex Discrimination

Plaintiff alleges that GPTC's "gift" of free television time constitutes a special favor in violation of the Code of Ethics ("the Code") governing commissions. See O.C.G.A. section 45-10-3 (1990). At the October 4, 1990, hearing, the Court indicated that GPTC's actions relating to the debates did not appear to constitute special favors within the meaning of the Code. See Transcript at 6. Plaintiff has submitted no evidence or argument that changes the Court's opinion on this matter. GPTC's choice of the participants in the debates was not an effort to bestow a benefit on the majority party candidates, but represented a decision concerning the popularity of the views and candidacies of the Libertarian representatives. As

discussed below, GPTC's decision to exclude the Libertarian candidates is violative of plaintiff's constitutional rights. It is not, however, a violation of the Code or grounds for a private right of action under the Code.

Equally unconvincing is plaintiff's argument that GPTC's televising of the debates amounts to commercial programming in violation of its statutory purpose. See O.C.G.A. section 20-13-8(a)(2)(Supp. 1990). There is no indication that the debates are a profitable endeavor for GPTC, nor does AJ&C's involvement render the events commercial in nature. Finally, plaintiff's contention that Rand was excluded because she is a female is inconsistent with his argument that he and Rand were excluded based on the content of their speech. The Court finds meritless plaintiff's argument

that the exclusion of Rand constituted sex discrimination.

D. First Amendment

Plaintiff alleges that defendants' refusal to allow Libertarian participation in the upcoming debates is violative of the First Amendment rights of freedom of speech and access. Defendants argue there is no First Amendment right of access to the broadcast media and, therefore, plaintiff's action should be dismissed for failure to state a claim. Defendants insist that GPTC is not a public forum for First Amendment purposes.

The type of restrictions which may be placed on First Amendment activities depends in large part on "the nature of the relevant forum." Cornelius v. NAACP Legal Defense Fund, 473 U.S. 788, 800 (1985). In a traditional public forum

and a 'created" public forum, speakers can be excluded only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. Id.; Perry Education Association v. Perry Local Educators' Association, 460 U.S. 43,45 (1983). The government is afforded considerably more latitude in a nonpublic forum: "Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." Cornelius, 473 U.S. at 806. In other words, the government may not deny access to a speaker "solely to suppress the point of view he espouses on an otherwise includable subject." Id. Unlike in most First Amendment

cases, the Court in this instance need no determine the nature of the forum at issue because defendants have failed to even articulate a reasonable basis for excluding ballot-qualified Libertarian candidates from a nonpublic forum.

The stated reason for the exclusion of plaintiff and intervenor from the debates by GPTC is that:

> "Were its air waves open for unrestricted access to all citizens, the GPTC would be unable to operate within the guidelines set by Congress through enactment of the Federal Communications Act ... . GPTC clearly has as its legitimate purpose the dissemination of newsworthy information in a format it judges to be responsive to the demands of the public. The citizens of Georgia will, in large measure, vote for either the Democratic or Republican candidates in the upcoming elections."

Defendant's Reply Brief at 5. At the October 18, 1990, hearing, Dick Ottinger ("Ottinger"), Executive Director of GPTC, stated that he and the other

officers of GPTC decided to include only the two "frontrunners" in each debate because the information presented by the majority candidates was of greater interest to the public and, therefore, more newsworthy.

Although the state's basis for its decision to restrict access to a nonpublic forum need not be the most reasonable or only reasonable basis, Cornelius, 473 U.S. at 808, "[t]he existence of reasonable grounds for limiting access to a nonpublic forum will not save a regulation that is in reality a facade for viewpoint based discrimination." Searcy v. Crim, 888 F.2d 1314, 1324 (11th Cir. 1989), citing Cornelius, 473 U.S. at 811.5 The basis articulated by defendants is not even an attempt to mask their content-based motivations.

The Libertarian platform admittedly represents a minority point of view in Georgia and is less popular than that of the traditional parties. However, to exclude a ballot-qualified candidate from debates hosted by GPTC because the candidates' views are of less interest to the public or less newsworthy6 is viewpoint based discrimination in violation of the First Amendment.7 See Kelley v. WMUL-TV, 7 Med.L.Rptr. 1094, 1095 (S.D.Va. 1980). A decision on the popularity of a particular candidate necessarily includes a judgment regarding the content of the political speech. An agency of the state cannot make a unilateral decision concerning the content of the views of a minority candidate, even in a nonpublic forum. The Court finds defendants' decision to exclude plaintiff and intervenor a

constitutionally impermissible prior restraint based upon content.

The Court is not suggesting that defendants are required to include the entire citizenry of Georgia as possible participants in the debates. Rather, plaintiff argues that as ballot-qualified candidates8 for the Libertarian party, he and intervenor should be permitted to participate in debates which include the other ballot-qualified candidates. The proposed ballots in the two races will include only the Republican candidates, the Democratic candidates, and the Libertarian candidates. Inclusion of one more ballot-qualified candidate in each of the debates will not impede GPTC's ability to operate within the Federal Communications Act. Moreover, Ottinger testified that the only problem with including a third candidate in each

debate is that it would diminish the time available for each candidate to present his or her views. However, Ottinger also stated there would be no problem with extending the one hour format by one half-hour to accomodate the additional participants.9

The Court finds that it is not reasonable to exclude these candidates from the debates in light of the circumstances and of the purpose to be served by the forum. There would be little if any disruption to the forum if plaintiff and intervenor are included in the upcoming debates. Additionally, the effectiveness of the debates, rather than the effectiveness of the individual presentations by the candidates, will not be ~~hind~~ered. See Cornelius, 473 U.S. at 811 (First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic

forum and would hinder its effectiveness for its intended purpose).

The Court's decision does not go so far as to find a right of access to the broadcast media. See DeYoung v. Patton, 898 F.2d 628 (8th Cir. 1990)(no constitutional right of access to state broadcast facility).

Rather, the Court holds that the government cannot restrict access to a public or nonpublic forum to suppress an otherwise includable viewpoint. Cornelius at 808. Plaintiff and intervenor have been excluded from the upcoming debates because defendants believe they may exercise unbridled discretion in choosing participants in a political discourse amount ballot-qualified candidates. The First Amendment protects the Libertarian candidates from such unreasonable restriction on speech.

E. Equal Protection

Plaintiff also alleges that defendants' decision to exclude them from the debates violates the Equal Protection Clause of the Fourteenth Amendment. Plaintiff and intervenor are not a protected class for equal protection purposes; therefore, the Court must examine defendants' actions under the "minimal scrutiny" standard giving deference to state objectives. However, the state must exhibit "some rationality in the nature of the class singled out." Rinaldi v. Yeager, 384 U.S. 305, 308-09 (1966).

Chandler is similarly situated with the Republican and Democratic candidates for Lieutenant Governor. Likewise, Rand is similarly situated with the Republican and Democratic gubernatorial candidates. All are "ballot-qualified," meaning, theirs are the only names that

will appear on the ballots for these two state-wide offices. The Court cannot find, and defendants have not offered, any legitimate public purpose or rational purpose for excluding the third-party candidates. Certainly the fact that the Libertarian candidates are less popular than the majority parties' candidates is not a rational basis for the exclusion. For many of the same reasons that defendants' actions violate the First Amendment, the Court finds a violation of the Equal Protection clause of the Fourteenth Amendment.

III. Conclusion

To prevail on his motion for a temporary restraining order, plaintiff must establish four factors:

a. a substantial likelihood that plaintiff will prevail on the merits;

b. a substantial threat that plaintiff will suffer irreparable injury

if the injunction is not granted;

c. that the threatened harm to plaintiff outweighs the possible harm to defendants should they be enjoined; and

d. that the grant of a injunction will not disserve the public interest. United States v. Alabama, 791 F.2d 1450, 1459 n.10 (11th Cir. 1986), cert. den. 107 S.Ct. 1287 (1987). Plaintiff and intervenor will suffer irreparable injury if they are excluded from the debates, they will lose the opportunity to participate with other ballot-qualified candidates, and the harm will greatly outweigh any harm to defendants if the injunction is issued. Also, plaintiff will quite probably succeed on the merits of his constitutional claims. Most important, the public's interest will be best served by vindicating the constitutional rights of plaintiff and intervenor.

Accordingly, the Court GRANTS plaintiff's motion for a temporary restraining order and ENJOINS defendants from televising the debate between the candidates for lieutenant governor scheduled for November 2, 1990, and the gubernatorial debate scheduled for November 4, 1990, unless they include the ballot-qualified Libertarian candidates as participants.

IT IS SO ORDERED, this 18th day of October, 1990.

_____

Marvin H. Shoob, Judge United States District Court, Northern District of Georgia

1 On October 12, 1990, the Court also issued a written order on Williams' motion to intervene.

2 Plaintiff served all defendants by depositing the amended complaint in the U.S. Mail on October 17, 1990.

3 Section 315 provides in pertinent part:

> (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station.

4 In fact, plaintiff and intervenor previously were offered equal air-time yet contend that it is worthless compared to the exposure provided by the televised debates. See Transcript at 6.

5 While GPTC relies on Searcy to support its assertion that the content based restriction is reasonable in light of the purpose of the forum, it fails to address other portions of Searcy which clearly state that the government may not manufacture a basis for its restriction in an effort to conceal its attempt to distinguish between particular speakers based on their views. 888 F.2d 1324.

6 GPTC insists that it made a decision on the newsworthiness of the debates at issue in accordance with the statutory purposes of the forum. GPTC

is "created, designed, and intended for the purpose of providing educational, instructional, and public broadcasting services to the citizens of the state of Georgia." O.C.G.A. section 20-13-5(a)(Supp. 1990). The broadcasting services provided by GPTC have traditionally presented educational and instruction programming of the type that is often neither newsworthy nor popular. However, GPTC presents its argument as if its primary objective is to offer programming, similar to that offered by commercial broadcasters, that is preferred by the majority of the public. The court finds that GPTC's position conflicts with the actualities of its operations. Additionally, GPTC has not merely decided to "cover" newsworthy events, it has actually created the debates at issue.

7 Defendants and AJ&C in its amicus curiae brief argue that GPTC's airing of the debates merely amounts to coverage of a new event which is of interest to the citizens of Georgia. Regardless of how GPTC's participation is described, it remains an agency of the state which through its officers and directors has decided to prohibit ballot-qualified candidates from taking part in political debates that will be presented to the public by GPTV. AJ&C's participation does not make the decision regarding the gubernatorial debate any less of a content-based restraint on speech.

8 Chandler and Rand marshalled considerable support to become "ballot-qualified." They submitted a nomination petition "signed by a number of voters equal to 1 percent of the total number

of registered voters eligible to vote in the last election for the filling of the office the candidate is seeking. O.C.G.A¶ 21-2-170(a)(Supp. 1990). Chandler and Rand also paid a substantial qualifying fee.

9 GPTC's failure to consider such a minor change or alternative format supports the finding that the restriction is unreasonable and bolsters the Court's conclusion that the exclusion is viewpoint based. See Searcy, 888 F.2d at 1321-22.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8968

D.C. Docket No. 1:90-cv-2040-MHS

WALKER CHANDLER,
Plaintiff-Appellee,

CAROLE ANN RAND,
Intervenor-Plaintiff,
Appellee,

versus

GEORGIA PUBLIC TELECOMMUNICATIONS COMMISSION, et al.,
Defendants-Appellants,

ATLANTA JOURNAL AND ATLANTA CONSTITUTION,
Intervenors-Defendants,
Appellants.

On Appeal from the United States
District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion October 31, 1990, 11th Cir., 19__, ___ F.2d ____).

Before CLARK, Circuit Judge, HILL and COFFIN, Senior Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (RUle 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8968

D.C. Docket No. 1:90-cv-2040-MHS

WALKER CHANDLER,
Plaintiff-Appellee,

CAROLE ANN RAND,
Intervenor-Plaintiff,
Appellee,

versus

GEORGIA PUBLIC TELECOMMUNICATIONS COMMISSION, et al.,
Defendants-Appellants,

ATLANTA JOURNAL AND ATLANTA CONSTITUTION,
Intervenors-Defendants,
Appellants.

Appeals from the United States District Court
for the Northern District of Georgia

Before CLARK, Circuit Judge, HILL and COFFIN, Senior Circuit Judges.

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the District Court in these causes be and the same is hereby VACATED; and that these causes be and the same are hereby REMANDED to said District Court with instructions to dismiss the complaint, in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that appellees pay to appellants, the costs on appeal to be taxed by the Clerk of this Court.

Entered: October 31, 1990
For the Court: Miguel J. Cortez, Clerk

ISSUED AS MANDATE: MAR 11, 1991

Supreme Court, U.S.
FILED
JUL 1 1991
OFFICE OF THE CLERK

(3)

No. 90-1863

In The

Supreme Court of the United States

October Term, 1991

WALKER L. CHANDLER and CAROLE ANN RAND,

Petitioners,

vs.

GEORGIA PUBLIC TELECOMMUNICATIONS COMMISSION, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The Court Of Appeals For The Eleventh Circuit

BRIEF OF GEORGIA PUBLIC TELECOMMUNICATIONS COMMISSION AND OTHER STATE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly found a state operated television broadcaster may air political debates only between the major party candidates to the exclusion of all others, since the broadcast activity does not constitute a public forum and does not operate as a pure marketplace of ideas?

2. Whether the Court of Appeals correctly found no denial of equal protection in a public broadcaster's decision not to invite Libertarian Party candidates to participate in televised political debates where such candidates are not members of a protected class and the decision was a rational exercise of broadcasting judgment?

3. Whether the issues raised by Petitioners' Complaint have become moot since the subject debates have already occurred?

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STATEMENT OF THE CASE

The Georgia Public Telecommunications Commission [hereinafter referred to as GPTC] is an instrumentality of the State of Georgia and is a public corporation. O.C.G.A. § 20-13-1(a). GPTC was created, in part, "for the purpose of providing educational, instructional, and public broadcasting services to the citizens of the State of Georgia." O.C.G.A. § 20-13-5(a). In performing its statutory functions GPTC is authorized and does hold licenses issued by the Federal Communications Commission. O.C.G.A. § 20-13-8(a)(1).

As a part of its scheduled programming, GPTC planned to televise debates between the Republican and Democratic candidates for Lieutenant Governor and Governor on November 2 and November 4, 1990, respectively. The November 4, 1990, gubernatorial debate was organized and sponsored by the Atlanta Journal and Constitution, whereas the debate for the lieutenant gubernatorial candidates was organized entirely by GPTC. Only the major party candidates were invited to participate in the debates. Petitioner Chandler, as the Libertarian candidate for Lieutenant Governor, requested that he be permitted to participate in the debate. GPTC, through its director, Dr. Richard Ottinger, denied Chandler's request, but offered time to both Chandler and Petitioner Carole Ann Rand, the Libertarian gubernatorial candidate, providing them an opportunity to appear on a separate televised program without opposition from the other candidates. Petitioners initially declined Dr. Ottinger's offer.

On September 17, 1990, Chandler sued GPTC in the United States District Court for the Northern District of

Georgia, seeking declaratory and injunctive relief and alleging that GPTC's decision not to invite him to participate in the debates violated the First Amendment and the Equal Protection clause of the Fourteenth Amendment. Chandler further alleged that GPTC's failure to invite Carole Ann Rand to participate in the gubernatorial debate constituted sex discrimination. On September 28, 1990, Carole Ann Rand sought and was permitted by the District Court to intervene as a party Plaintiff.

On October 3, 1990, GPTC moved to dismiss the complaint, asserting its immunity under the Eleventh Amendment, and further asserting that, as a licensee, the claims of Petitioners were matters within the exclusive jurisdiction of the FCC. Finally, GPTC asserted that the complaint failed to state a claim since neither the First Amendment nor the Fourteenth Amendment guaranteed political candidates access to television broadcasts by FCC licensees.

Subsequently, the District Court directed Petitioners to file an amended complaint adding the individual defendants who are all members and officers of the Georgia Public Telecommunications Commission.

On October 18, 1990, the District Court conducted an evidentiary hearing on the pending motions, and heard the testimony of Dr. Ottinger. Dr. Ottinger testified that it was the judgment of GPTC that a debate between the two major party candidates would be of more interest and more newsworthy in the absence of a third minority party participant. He further testified that his decision was not that the Libertarian Party viewpoint was of no interest to

the public, but rather that the debate would be more effective as a face off between the major party candidates.

The District Court concluded that the failure to include ballot-qualified candidates in GPTC's debate constituted viewpoint-based discrimination in violation of the First Amendment, citing *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788 (1985). Appendix at A-52. However, the District Court did state that it would not find a general right of access to the broadcast media.

In addition, the District Court found a denial of equal protection, finding no rational basis for GPTC's judgment to limit the debates to the major party candidates. Appendix at A-55.

On appeal to the United States Court of Appeals for the Eleventh Circuit, the District Court's grant of injunctive relief was vacated permanently with remand instructions that the complaint be dismissed. Appendix at A-11; *Chandler v. Georgia Public Telecommunications Commission*, 917 F.2d 486 (11th Cir. 1990). The Court of Appeals correctly recognized that content based editorial decisions are an integral part of all programming decisions, and that the decision to air debates between front runners was just such a decision, but was not one which was viewpoint driven. Finding the decision to be rational, the Court of Appeals found neither First Amendment violations nor a denial of equal protection under the Fourteenth Amendment. Appendix at A-6 through A-7; 917 F.2d at 489. Petitioners filed a Petition for Rehearing and Suggestion of Rehearing En Banc which were denied March 1, 1991. Appendix at A-61.

SUMMARY OF ARGUMENT

This case presents a challenge to the editorial discretion of broadcasters licensed by the FCC to provide programming in the public interest, and organized to provide educational and public broadcasting. As a broadcast licensee, GPTC has discretion to make subjective judgments about its programming, and this discretion extends to the manner in which it covers political campaigns and the candidates themselves.

The fact that GPTC is a state entity does not diminish its ability to make editorial judgments. *Muir v. Alabama Educational Television Commission*, 688 F.2d 1033 (5th Cir. 1982) (en banc), *cert. den.* 460 U.S. 1023 (1983); *Schneider v. Indian River Community College Foundation*, 875 F.2d 1537 (11th Cir. 1989). Since GPTC's programming judgment to broadcast a debate between the front running candidates was not an effort to suppress speech because of opposition to the viewpoint of the Libertarian candidates, and since there was no "policy or practice of GPTC that 'pervasively "curtail[s] access to ideas" lending a constitutionally impermissible, discriminatory bias to the state's mission.' " *Schneider*, 875 F.2d at 1541. Petitioners were not subjected to a violation of their First Amendment rights.

Likewise, since Petitioners are not members of a protected class, and the broadcast judgment of GPTC was rational, the decision to air debates between the major party candidates without participation by the Libertarian candidates was not a denial of equal protection under the Fourteenth Amendment.

ARGUMENT

I. GPTC'S EXERCISE OF BROADCAST DISCRETION IN DECIDING TO AIR DEBATES BETWEEN FRONT RUNNING MAJOR PARTY CANDIDATES WAS NOT AN UNCONSTITUTIONAL RESTRICTION OF PETITIONERS' FIRST AMENDMENT RIGHTS.

A. GPTC'S BROADCAST OF THE DEBATES DID NOT CONSTITUTE A PUBLIC FORUM.

Contrary to Petitioners' claim, the Court of Appeals did not consider GPTC's broadcast *facilities* to be the relevant forum upon which to base its consideration of this case. Rather, the Court of Appeals considered GPTC's "communicative activity" to be the relevant forum, finding that activity not to be a "pure marketplace of ideas." Appendix at A-4 through A-5; 917 F.2d at 488. The clear import of the Court of Appeals' discussion was that the broadcast activity of airing the debates in the format devised by GPTC for the lieutenant gubernatorial debate and by the Atlanta Journal and Constitution for the gubernatorial debate, did not constitute a public forum. This correct determination is consistent with this Court's decision in *Columbia Broadcasting Systems, Inc. v. Democratic National Committee*, 412 U.S. 94, 124 (1973), that no First Amendment public right of access to the television broadcast medium exists, even where access is sought for the purpose of disseminating views on public issues and matters of political interest. Moreover, other circuit courts of appeal have refused to recognize such an expanded right of access to the medium, either to demand a program be shown, that it not be shown, or that it include or exclude certain participants. *See generally, Muir v. Alabama*

Educational Television Commission, 688 F.2d 1033 (5th Cir. 1982) (en banc) *cert. den.*, 460 U.S. 1023 (1983); *DeYoung v. Patten*, 898 F.2d 628 (8th Cir. 1990); *Johnson v. Federal Communications Commission*, 829 F.2d 157 (D.C. Cir. 1987); *Kennedy for President Comm. v. Federal Communications Commission*, 636 F.2d 417 (D.C. Cir. 1980); *Belluso v. Turner Communications Corporation*, 633 F.2d 393 (5th Cir. 1980).

Thus, GPTC's broadcasting activity, given its statutory mission, does not constitute a public forum as claimed by the Petitioners. The programs at issue here are political debates, but they are merely one particular format of numerous programming possibilities from which GPTC, in its discretion, might have selected in providing coverage of the campaigns. The debates were not open invitations for general political discourse as Petitioners would have this Court believe.

B. GPTC'S DECISION WAS A RATIONAL EXERCISE OF ITS JOURNALISTIC DISCRETION.

This Court has held:

> Access to a non-public forum . . . can be restricted as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's views.

Cornelius v. NAACP Legal Defense and Education Fund, 473 U.S. 788, 800 (1985), quoting *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983). Of course, Petitioners would impose a strict scrutiny – compelling state interest standard of review in this case. That level of

review would subject *all* programming decisions to judicial intervention, which is clearly contrary to the statutory scheme of the Federal Communications Act, and any reasoned approach to First Amendment application in the broadcast media.

The programming decision here was reasonable. It was determined that the major party candidates, who were by far the front runners in each of the two political races, were more newsworthy. Dr. Ottinger testified the debates would be more beneficial to the voters if limited to the major party candidates, permitting more focused examination of the issues. This is precisely the type of programming decision made by broadcasters on a daily basis. Programming requires a broadcaster to select what programs to air or what speakers to interview. The selection obviously excludes others from participation, and as long as the selection process is not an effort to suppress the view of others, no First Amendment violation occurs.

The record in this case is void of any evidence GPTC made its program choice in an effort to suppress the views of the Libertarian candidates. In fact, GPTC offered air time to both Petitioners, which was initially refused, but later accepted after the Court of Appeals' decision in this case.

Moreover, the record does not reveal any policy or practice of GPTC designed to "curtail access to ideas" or the positions of the Libertarian Party which would establish a "discriminatory bias" on the part of this broadcaster. *Muir*, 688 F.2d at 1053.

There being no effort on the part of GPTC to censor or otherwise prevent the dissemination of the viewpoints

of the Libertarian candidates, the Court of Appeals correctly found that Petitioners have not been subjected to any violation of their First Amendment freedoms of expression.

II. GPTC'S FAILURE TO INVITE THE LIBERTARIAN PARTY CANDIDATES DID NOT RESULT IN A DENIAL OF EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT.

The Court of Appeals found that the Petitioners, as political candidates, were not members of a protected class. Accordingly, the Court of Appeals found that the Respondents were required only to demonstrate that their decision to air debates without participation by the Libertarian candidates was rational, citing *Eide v. Sarasota County*, 908 F.2d 716, 722 (11th Cir. 1990). Finding the Respondents' decision to be rational, the Court of Appeals found no violation of the Equal Protection clause.

As an exercise of journalistic discretion, it is beyond question that GPTC's decision to air a more newsworthy program was a rational one. It was rational both for the purposes of First Amendment analysis as well as equal protection review. As indicated above, any programming judgment entails the selection of what programs will be aired or what persons will participate. This necessarily results in the exclusion of all others. The same dangers inherent in Petitioners' First Amendment claims exist with their equal protection arguments. Any programming decisions would be subject to judicial review on the naked assertion that the public broadcaster will air one perspective of an issue but not another. The obvious

result is that the beneficial activities of public broadcasting will be diminished to a cacophony of endless disorganized perspectives. This is inconsistent with the mission of GPTC and certainly is not required under the Equal Protection clause of the Fourteenth Amendment. Moreover, this result would reduce the regulatory scheme of the Federal Communications Act to a totally unacceptable level of ineffectiveness.

III. THE ISSUES RAISED IN PETITIONERS' COMPLAINT ARE NOW MOOT.

In *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), this Court noted that the:

> . . . case or controversy limitation serves "two complimentary" purposes. *Flast v. Cohen*, 392 U.S. 84, 95 (1968). It limits the business of federal courts to "questions presented in adversary context and in a form historically viewed as capable of resolution through the judicial process" and it defines the "role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude in the areas committed to the other branches of government." *Id.* Likewise, mootness has two aspects: "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome," *Powell v. McCormick*, 395 U.S. 486, 496 (1969).

Id. at 395-96. *See also Murphy v. Hunt*, 455 U.S. 478 (1981). In order to avoid mootness there must be an actual controversy at all stages of the litigation. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1974); *Steffel v. Thompson*, 415 U.S. 452, 459, n.10 (1974); *Roe v. Wade*, 410 U.S. 113, 125 (1973).

In this case, the debates which form the subject matter of the Petitioners' complaint have already occurred. The issues raised by the Petitioners have been adjudicated by both a district court and the United States Court of Appeals for the Eleventh Circuit. At this point in time there is no "case" or "controversy" with respect to whether the Libertarian party candidates were constitutionally entitled to participate in the debates.

While these issues may be "capable of repetition" there is no "reasonable expectation" or "demonstrative probability" that the conditions bringing rise to the complaint in this action will recur. *See Murphy v. Hunt*, 455 U.S. 478, 482 (1981). The doctrine of "capable of repetition yet evading review" simply does not apply in this case.

CONCLUSION

This case presents none of the special and important considerations favoring review by this Court on certiorari. Petitioners have pointed to no conflicting decisions of other United States Courts of Appeal and certainly have not illustrated that the United States Court of Appeals for the Eleventh Circuit has made a decision so far removed from normal judicial process as to demand an exercise of this Court's power. Moreover, Petitioners have not illustrated that the Court of Appeals' decision in this case conflicts in any way with applicable decisions of this Court. Supreme Court Rule 10.1(a)(b).

The opinion of the United States Court of Appeals for the Eleventh Circuit is imminently correct. That opinion allows for the proper exercise of editorial discretion in

performing programming for public television broadcasts consistent with state and federal statutory requirements.

For these reasons, these Respondents respectfully request that the Petition for Writ of Certiorari be denied, or in the alternative, that the opinion of the Court of Appeals be summarily affirmed.

Respectfully submitted,

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Supreme Court, U.S.
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(4)

No. 90-1863

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

WALKER L. CHANDLER and CAROLE ANN RAND,
Petitioners,
vs.
GEORGIA PUBLIC TELECOMMUNICATIONS COMMISSION, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONERS' REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Respondent Georgia Public Telecommunications Commission ("GPTC") asserts in its responsive brief that because the debates which form the subject matter of this case have already occurred, the case is moot. GPTC avers that "[t]he doctrine of 'capable of repetition yet evading review' simply does not apply in this case." GPTC Brief at 10. This assertion is incorrect.

The Court has considered the question of mootness as specifically applied to cases involving candidates for political office. In Moore v. Ogilvie, 394 U.S. 814 (1969), the appellants were independent candidates from Illinois for the offices of electors of President and Vice President of the United States. The appellants challenged the Illinois statutes concerning petition requirements for such candidates.

The appellees sought to dismiss the action on the grounds that the election in question had already been held, and because the relief sought by the appellants could not be granted. In determining that the case was not moot, the Court stated that:

> while the 1968 election is over, the burden which MacDougald v. Green, supra, allowed to be placed on the nomination of candidates for statewide offices remains, and controls future elections, as long as Illinois maintains her present system as she has done since 1935. The problem is therefore "capable of repetition, yet evading review," Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498, 515 (1911). The need for its resolution thus reflects a continuing controversy in the federal-state area where our "one man, one vote" decisions have thrust.

Moore, 394, U.S. at 816.

The Court also decided two cases in 1974 which addressed the mootness question in the context of political

candidates. In Storer v. Brown, 415 U.S. 724 (1974) the Court considered a California Elections Code provision dealing with independent candidates for public office. The Court stated that:

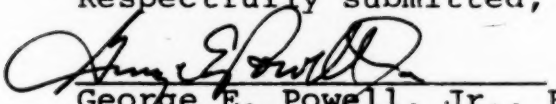
> [t]he 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections. This is, therefore, a case where the controversy is "capable of repetition, yet evading review."

Id. at 737, n. 8 (citations omitted). The Court reached the same conclusion in American Party of Texas v. White, 415 U.S. 767, 770, n. 1 (1974), a case interpreting the constitutionality of the ballot provisions of the Texas Election Code.

The Court's analysis in those cases is applicable to the case at bar. Although the debates at issue have

already occurred, the legal issue involved here will arise each time debates are broadcast prior to elections for public office and third-party candidates seek to participate in those debates. Because of the extremely short time window - two to four days prior to the election for the debates in the instant case - there will never be enough time to adjudicate the issue before the election passes and debate participation becomes purportedly moot. This case is precisely the kind of matter which is "capable of repetition, yet evading review," and therefore the Court should consider the case on its merits.

Respectfully submitted,



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